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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 255

THE AMERICAN SHIP BUILDING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. 12–14) is reported at 331 F. 2d 839. The Board's decision and order are reported at 142 NLRB 1362.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1964 (Pet. 15). The petition for writ of certiorari was filed on July 6, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board's findings adequately set out the basis of its conclusion that petitioner's lockout of

its employees violated the National Labor Relations Act.

2. Whether, in the absence of a strike threat, an employer engaged in collective bargaining with a labor union is privileged to layoff his employees for the purpose of obtaining a favorable contract.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act are printed at pages 17–20 of the petition.

STATEMENT

Petitioner builds ships and repairs vessels at four shipyards adjacent to the Great Lakes. The Company's busy season is between November and April, when the Lakes are often frozen and shipowners are more willing to take their ships out of service for repair (J.A. 272; 74, 156).[1] During the summer months, however, petitioner always retained a nucleus of employees to perform yard maintenance and emergency repairs, and to prepare for the winter (J.A. 273; 74, 78, 191, 213).

In the spring of 1961, petitioner and a negotiating team representing eight craft unions exchanged proposals for a new contract to replace one then in effect and due to expire on August 1. Bargaining continued during June and July (J.A. 262–264). At the first bargaining session, the Unions' chief negotiator, Alexander, announced that the Unions wished to

[1] "J.A." refers to the Joint Appendix printed for the court below and filed with the petition.

negotiate an agreement without a strike, thus avoiding the shutdowns that had occurred in five of the past ten years (J.A. 262, 269; 28). He assured petitioner that the Unions "definitely did not intend to have a strike" (J.A. 269; 31–32), and other Union representatives told the Company that it could freely accept jobs because the employees would guarantee completion of whatever work was in the shipyards (J.A. 269–270; 31–32).

On July 19, when the parties had agreed upon 20 articles of a new contract (J.A. 110, 137–139), the Unions proposed a six-month extension of the old contract, which contained a no-strike clause (J.A. 263; 34). The Company rejected the suggestion on the ground that the extension would expire at the height of the busy season (*ibid.*). The Unions repeated their extension proposal on July 31 and made several counterproposals with respect to issues still dividing the parties (J.A. 264; 34–35, 112–113). The counterproposals were all rejected, but the Company asked and the Unions agreed that the Company's latest offer be presented to the employees. The Unions suggested further that the existing contract be extended until a new agreement, to be made retroactive to August 1, had been reached (J.A. 264; 35). Without explanation, the Company rejected that suggestion (J.A. 264; 35, 177), but it agreed to extend the existing contract long enough for the Union members to vote. Petitioner then asked if the Unions were going to strike the following morning. Alexander replied that they were not, reminded the Com-

pany that the Unions had consistently said that they were not going to strike, and reiterated this intention (J.A. 264; 35–36). The employees continued to work after the contract expired on August 1, but they rejected the Company's last proposal (J.A. 264; 35–36). When the Unions informed petitioner of the employees' rejection of its proposal on August 8, Company negotiators asked why the Unions had not struck (J.A. 264; 38). Alexander replied that the Unions "had insisted that we never intended to strike" (J.A. 264; 38). The next day, August 9, the Unions refused to take a new Company proposal back to the membership on the ground that the new proposal was less generous than the Company's previous offer (J.A. 265; 63–64).

Two days later, the Company shut down its Chicago yard, notifying the employees that it was laying them off because of "the labor dispute which has been unresolved since August 1, 1961" (J.A. 265–266).[2] In addition, petitioner laid off most of its employees at the Toledo yard, and began progressively to lay off workers at the Buffalo yard. At Lorain, however, an extensive force was engaged in the alteration of a large tanker, and none of those men was laid off (J.A.

[2] The Company determined to word the layoff notices in that manner in order to deprive the laid-off employees of unemployment compensation (J.A. 266). In Illinois the employees were unable to obtain unemployment compensation because under Illinois law loss of work as a result of a labor dispute is noncompensatory. In Ohio and New York when employees filed for benefits, the Company protested the allowance of compensation (J.A. 266; 129–130).

272; 150–151). As the job was completed the Company laid off the Lorain employees. No employees at any yard went on strike (J.A. 247).

On August 19, at another bargaining session, the Company's attorney stated that the Company could not take on any work because it did not know when the Unions were going to strike. In reply, Union representatives repeated their assurance that there would be no strike and again guaranteed that work taken into the yards would be completed, pointing out that no employees had quit at Lorain (J.A. 40–42). Finally, on October 22, a new contract was signed, and the laid-off employees were recalled to resume the emergency and maintenance work they had been doing prior to the August layoffs (J.A. 267, 274; 73, 74).

On these facts, the Board concluded that petitioner had violated Sections 8(a) (1) and (3) of the National Labor Relations Act by curtailing its operations and laying off its employees to force the Unions to abandon their contract demands (J.A. 295–296). It rejected petitioner's contention that the lockout was privileged under Board cases holding that lockouts were lawful to protect customers' property, prevent inventory spoilage, or guard the public safety from the effects of an imminent strike (J.A. 295).[3] Since the

[3] *E.g., Duluth Bottling Ass'n*, 48 NLRB 1635; *Betts Cadillac Olds, Inc.*, 96 NLRB 268; *Building Contractors Ass'n*, 138 NLRB 1405. The Trial Examiner had found the lockout privileged on this ground, and two Board members, who dissented, would have accepted this finding (J.A. 286–290, 301–305).

Unions had given numerous assurances that they would not strike and had promised that work in petitioner's yards would be completed, the Board concluded that petitioner could not reasonably have feared a strike. Consequently, the Board held that the lockout had been used by petitioner as an "offensive weapon" and, as such, was violative of the Act. It ordered petitioner to cease and desist and to reimburse certain laid-off employees for loss of pay (J.A. 295, 297–298).[4]

The court of appeals enforced the Board's order. Viewing the problem as one of balancing the legitimate interests involved, the court concluded that the balance struck by the Board was entitled to stand (Pet. 12–14).[5]

DISCUSSION

1. The court of appeals properly rejected petitioner's contention that the Board's findings inadequately spelled out the coercive and discriminatory impact of the lockout (Pet. 13, n. 1). No special circumstances distinguish this case from others in which the Board has explained why lockouts have such an effect. See, *e.g., Morand Bros. Beverage Co.*, 99 NLRB 1448, 1461–1466; *American Brake Shoe Co.*, 116 NLRB 820, 826. See also J.A. 296, n. 8 (citing cases). Conse-

[4] Since the complaint was restricted to the layoffs at petitioner's South Chicago yard, the backpay order was similarly restricted (J.A. 297–298).

[5] The court also rejected certain contentions of Local 374, International Brotherhood of Boilermakers, the charging party, seeking to enlarge the scope of the Board's remedial order, made in its petition for review. Those contentions are not relevant here.

quently, the Board was not required to repeat the same detailed findings here. See *Republic Aviation Corp. v. National Labor Relations Board*, 324 U.S. 793, 803–805.

2. (a) The question whether the lockout was unlawful turns on whether the Board properly balanced the competing interests involved. Lockouts during contract negotiations discourage collective bargaining by depriving employees of their livelihood on account of demands made by their representatives at the bargaining table. They interfere with the full enjoyment of the right to strike, by depriving the union of the opportunity to time the shutdown, an important attribute of the strike.[6] Since strikes, collective bargaining, and union activity are all "concerted activities" protected by Section 7 [7] and since lockouts during contract negotiations interfere with those activities, such lockouts fall within the literal ban of Section 8 (a)(1). They also violate the literal terms of Section 8(a)(3), for depriving employees of work in

[6] Protection of the right to strike is essential to the equality of bargaining power upon which the Act relies to preserve industrial peace. National Labor Relations Act, Sec. 1, pars. 2, 3. See 93 Cong. Rec. 3835, 2 Legislative History of the Labor Management Relations Act, 1947, 1007 (1948) (remarks of Senator Taft).

[7] See National Labor Relations Act, Sections 1, 7, 13; *Automobile Workers v. O'Brien*, 339 U.S. 454, 456–457, n. 3; *Amalgamated Association v. W.E.R.B.*, 340 U.S. 383, 389, 395, n. 21 Cf. *National Labor Relations Board v. International Rice Milling Co.*, 341 U.S. 665, 673, n. 8.

these circumstances is "discrimination"[5] which foreseeably discourages union membership and activity. On the other hand, lockouts, where not motivated by anti-union considerations, may also serve important, legitimate interests of employers. Thus, the "ultimate problem [in lockout cases] is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *National Labor Relations Board* v. *Truck Drivers Local 449*, 353 U.S. 87, 96.

There are three groups of cases in which employers have locked out their employees for the purpose of attaining objectives in *bona fide* negotiations: (1) cases in which the employer locked out his employees in order to protect himself against a threatened strike which would result in unusually severe economic harm; (2) cases in which all the members of multi-employer bargaining unit closed their doors when the union struck one member in support of contract demands against all; and (3) cases in which the employer in a single company bargaining unit locked out in order to induce the union and the employees

[5] Detrimental treatment constitutes Section 8(a)(3) "discrimination" even if it is meted out equally to union members and nonmembers. See, *e.g.*, *National Labor Relations Board* v. *Somerset Shoe Co.*, 111 F. 2d 681 (C.A. 1) (lockout upon demand for collective bargaining); *National Labor Relations Board* v. *Stremel*, 141 F. 2d 317 (C.A. 10) (same); *National Labor Relations Board* v. *Somerset Classics, Inc.*, 193 F. 2d 613 (C.A. 2), certiorari denied *sub nom. Modern Mfg. Co.* v. *National Labor Relations Board*, 344 U.S. 816 (same).

to accede to his economic demands (the situation here).

The Board has consistently held that in the first situation the lockout serves a purely "defensive" purpose, and that, on balance, it is privileged (see cases cited in n. 3, p. 5, *supra*).

In the second situation the Board was originally of the view that the lockout could not be so justified, and that it was not privileged. *Morand Bros. Beverage Co.*, 99 NLRB 1448, 1461–1466; *Davis Furniture Co.*, 100 NLRB 1016; *Continental Baking Co.*, 104 NLRB 143. In 1954, however, the Board changed its view, concluding that a lockout in this situation served the legitimate defensive purpose of protecting the multi-employer unit against the divisive effects of successive strikes against each member of the unit individually. *Buffalo Linen Supply Co.*, 109 NLRB 447, sustained by this Court in *National Labor Relations Board v. Truck Drivers Local 449, supra.*

The third situation was not squarely presented to the Board until after the *Buffalo Linen* decision, but the Board, in its disposition of the first two types of cases, indicated that it would view a lockout by a single employer purely for bargaining purposes as unfair (see *Morand, supra*). That view was subsequently incorporated into Board decisions. See, in addition to the instant case, *American Brake Shoe Co.*, 116 NLRB 820; *Quaker State Oil Refining Corp.*, 121 NLRB 334; *Utah Plumbing and Heating Contractors Ass'n*, 126 NLRB 973; *Dalton Brick & Tile Corp.*, 126 NLRB 473.

In the Board's view a lockout by a single employer solely to advance his bargaining position, and not for "defensive" purposes, is not privileged. Such a lockout, as shown above, seriously intrudes upon legitimate employee interests, and this injury outweights any injury to the employer from denying him the weapon, particularly since there are other, less drastic means at his disposal for protecting his bargaining position. Thus, an employer may counter union bargaining demands by unilaterally changing working conditions once an impasse has been reached (*National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217), and may resist a strike by permanently replacing the strikers (*National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333); in the Board's view, the availability of these alternatives makes it unnecessary for him to resort to a lockout.

We submit that the Board's accommodation of the competing interests is reasonable and should not be disturbed. Accordingly, since the Board found that the lockout here was used only to advance petitioner's bargaining position,* the court below was correct in

*Substantial evidence supports the Board's finding that the lockout here was not "defensive." The Unions repeatedly assured petitioners that there would be no strike, guaranteed that any work in petitioner's yards would be completed, and offered to extend an existing contract containing a no-strike clause for six months or until a new contract was negotiated. Even when petitioner locked out its employees, the Union did not strike. In these circumstances, the Board properly found that petitioner could not reasonably have anticipated a strike, and that it locked out its employees merely to improve its bargaining position.

sustaining the Board's determination. The ruling below accords with that of two other courts of appeals to which the same issue has been squarely presented. *Quaker State Oil Refining Corp.* v. *National Labor Relations Board,* 270 F. 2d 40 (C.A. 3), certiorari denied, 361 U.S. 917; *Utah Plumbing & Heating Contractors Ass'n* v. *National Labor Relations Board,* 294 F. 2d 165 (C.A. 10).

(b) Most of the economic lockout cases which have thus far come before the Board have involved either multi-employer bargaining units—a situation now controlled precisely by *Truck Drivers, supra*—or circumstances in which the lockout was found justified in order to protect against unusual economic hardship.[10] The propriety of the use of the lockout as an "offensive weapon" in collective bargaining has not proved a major practical problem in the administration of the Act. The issue, however, is fundamental, and has generated considerable discussion.[11] The decision below appears to be in conflict with the decision of the Fifth Circuit in *National Labor Relations Board* v. *Dalton Brick & Tile Corp.,* 301 F. 2d 886. For, while the Fifth Circuit refused to "generalize in absolutes, or

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[10] Two members of the Board and the Trial Examiner thought that the instant case presented such a situation (see n. 3, p. 5, *supra*). And see *American Brake Shoe Co.* v. *National Labor Relations Board,* 244 F. 2d 489 (C.A. 7).

[11] See *e.g.,* Meltzer, *Single and Multi-Employer Lockouts Under the Taft-Hartley Act,* 24 U. of Chi. L. Rev. 70; Meltzer, *Lockouts under the LMRA: New Shadows on an Old Terrain,* 28 U. of Chi. L. Rev. 614; Koretz, *Legality of the Lockout,* 4 Syracuse L. Rev. 251; Koretz, *The Lockout Revisited,* 7 Syracuse L. Rev. 263.

cast the decision in doctrinaire terms of 'No Contract, No Work' " (*id.* at 892) and noted "that each case must be carefully measured by its own setting" (*id.* at 894), the main thrust of the opinion was to reject the Board's view that a lockout to obtain a bargaining advantage is, unless justified by special circumstances, a violation of Sections 8(a) (1) and (3). Furthermore, while *Morand Brothers Beverage Co.* v. *National Labor Relations Board,* 190 F. 2d 576 (C.A. 7) and *Leonard* v. *National Labor Relations Board,* 197 F. 2d 435 (C.A. 9) are clearly distinguishable (see, *supra,* p. 9), the philosophy expressed in those cases as to the basic status of the lockout under the Act is sharply at variance with the position taken by the Board here and in other cases.

In these circumstances, we do not oppose the granting of certiorari limited to the second question presented.

Respectfully submitted.

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